

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

NICHOLAS A. MECONI,

Defendant-Appellee.

---

FOR PUBLICATION

January 24, 2008

9:05 a.m.

No. 273040

Wayne Circuit Court

LC No. 06-100055

Advance Sheets Version

Before: Servitto, P.J., and Sawyer and Murray, JJ.

MURRAY, J.

The prosecution was granted leave to appeal the trial court's order denying leave to appeal a district court order excluding the testimony of the alleged victim. On appeal, the prosecution argues that the trial court erred in excluding the victim's testimony because the victim had a constitutional right to be present at all portions of the trial. Const 1963, art 1, § 24. Alternatively, the prosecution argues that even if there is no such constitutional right, the trial court still abused its discretion in excluding the testimony. Although we do not necessarily disagree with the first argument, we believe this case is more prudently resolved through acceptance of the second argument.

**Background**

On September 16, 2005, Nikki Kleinsorge was visiting the home of Rose Meconi, who is Kleinsorge's aunt and defendant's mother. Defendant eventually arrived at the house and was angry about Kleinsorge's presence. Kleinsorge alleged that defendant grabbed her and threw her from the front porch. Kleinsorge allegedly landed on her right arm and fractured her right elbow.

Defendant was scheduled to be tried in the 25th District Court in Lincoln Park. At the outset of the bench trial, the district court ordered that the witnesses be sequestered as follows: "Anyone who is scheduled to testify, may testify, anticipates, probably could, please stand, leave the courtroom, do not discuss your anticipated testimony, nor your completed testimony until released by the Court."

The prosecutor and the defense attorney proceeded to make brief opening statements. At the conclusion of opening statements, the prosecutor called Kleinsorge as his first witness. At that time, the court realized that Kleinsorge had remained in the courtroom during opening

statements. When the judge asked why she did not leave the courtroom before the opening statement, Kleinsorge indicated that she was instructed to remain by "the crime victim's woman that's here," i.e., the crime victim's advocate. The district court ultimately declared a mistrial, ruling that, although neither the prosecutor nor defense counsel were at fault for the occurrence, Kleinsorge nevertheless "ha[d] some taint" and the Court had no other method to rectify the problem. The district court subsequently precluded Kleinsorge from testifying at the new trial, again concluding that Kleinsorge was tainted and that there was no way to remedy that taint and still allow the witness to testify.

On appeal, the circuit court entered an order reversing the district court's order excluding Kleinsorge's testimony. The circuit court indicated that the district court's order violated the victim's right to be present during trial pursuant to Const 1963, art 1, § 24. However, the circuit court reconsidered its prior determination, vacated the order, and denied the prosecutor's application for leave to appeal. As a result, Kleinsorge's testimony remained excluded from trial. The prosecutor subsequently filed an application for leave to appeal in this Court, which we granted.

### Analysis

It is our duty to refrain from deciding constitutional issues when a case can be decided on other grounds. *Wayne Co v Hathcock*, 471 Mich 445, 456 n 10; 684 NW2d 765 (2004). As explained below, regardless of whether the victim had a constitutional right to remain in attendance throughout a trial, the trial court's decision to exclude the victim's testimony was, under the facts presented, outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The purposes of sequestering a witness are to "prevent him from 'coloring' his testimony to conform with the testimony of another," *People v Stanley*, 71 Mich App 56, 61; 246 NW2d 418 (1976), and to aid "in detecting testimony that is less than candid." *Geders v United States*, 425 US 80, 87; 96 S Ct 1330; 47 L Ed 2d 592 (1976). Additionally, the United States Supreme Court has recognized three sanctions that are available to a trial court to remedy a violation of a sequestration order: "(1) holding the offending witness in contempt; (2) permitting cross-examination concerning the violation; and (3) precluding the witness from testifying." *United States v Hobbs*, 31 F3d 918, 921 (CA 9, 1994), citing *Holder v United States*, 150 US 91, 92; 14 S Ct 10; 37 L Ed 1010 (1893). Although usually stated in the context of a defense witness's exclusion in a criminal case, courts have routinely held that exclusion of a witness's testimony is an extreme remedy that should be sparingly used. See, e.g., *United States v Smith*, 441 F3d 254, 263 (CA 4, 2006); *Hobbs, supra*.

If the victim in this case had a constitutional right to be present for the entire trial proceedings, as aptly suggested by the concurrence, the trial court certainly would have abused its discretion in precluding the testimony. However, *even if* the victim did not have such a right,<sup>1</sup>

---

<sup>1</sup> We quickly point out to the reader that, for the sake of argument, we are only assuming the victim does not have such a constitutional right.

the trial court still abused its discretion by imposing such a severe sanction. It is undisputed that the violation of the sequestration order resulted from an innocent mistake. The trial court repeatedly remarked that it did not find fault with anyone, as neither defense counsel, the prosecutor, nor the trial court saw the victim sitting in the courtroom. That the violation was not purposeful is a significant mitigating factor. So is the fact that the victim only heard short opening statements, not testimony, given that MRE 615 specifically provides for sequestration of witnesses "so that they cannot hear *the testimony of other witnesses*." (Emphasis added.) See, also, *Stanley, supra*. Finally, this was a scheduled bench trial, and the trial court would certainly be capable of determining the victim's credibility knowing that she heard the opening statements. In light of these mitigating factors, the trial court abused its discretion in implementing the most severe sanction.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Deborah A. Servitto

Servitto, P.J., concurred.